

Chapter 7

Freedom of Expression and the Chilling Effect

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1. Introduction to the chilling effect

The notion of speech, or expression, being 'chilled' is a pervasive and popular one. It metaphorically suggests a negative deterrence of communication: that a person or organisation is made physically colder by inhibiting the exercise of their right to free expression.

The chilling effect is not an esoteric legal metaphor: journalists and campaign groups cite it frequently. It can, but does not have to mean, an outright obstruction of human rights relating to speech. 'Chilling' does not necessarily mean to make ice cold; the metaphorical suggestion of temperature suggests a scale of deterrence from cool to freezing. The chilling effect is used to describe overt censorship such as a government banning publication of a book, as well as more subtle controls such as ambiguous legislation and high legal costs that provoke uncertainty and fear among writers and journalists.

The judiciary has played an important role in the popularisation of this highly flexible metaphor. Since the mid-1950s judges – first in the United States but now all over the world - have used it to explain decisions relating to individuals' and organisations' right to freedom of expression. Despite its global prevalence, there has been very little interrogation of what it actually means and the rare attempts to systematically document the chilling effect of statutes and judicial decisions on freedom of expression are stymied by a lack of reliable and available data.

With a focus on the chilling effect's origins in the US and the jurisdiction of England and Wales, this chapter first traces the historical roots of the 'chilling effect' concept in relation to human rights, and in particular, laws of defamation and privacy, and the areas of freedom of information and state surveillance. It then considers the difference between its judicial and social use within and between these distinct areas of law. Second, it turns to the question of measurement, examining attempts to systematically document the chill. Third, it considers the impact of the chilling effect metaphor on communication law and policymaking and argues that in order to better protect fundamental human rights, there is a need for clearer articulation by lawmakers of desired boundaries for legitimate speech.

2. Historical development of the chilling effect

2.1. First Amendment origins

The first documented appearance² of the 'chill' metaphor to describe the future deterrence of free activity and speech is in a First Amendment case which recognised that demanding a loyalty oath from state employees in Oklahoma had 'an unmistakable tendency to chill ... free play of the spirit' and made 'for caution and timidity in their associations by potential teachers' (U.S. 1952: p. 195). Ten years later, the 'chilling effect' concept made its debut; the court identified a 'deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech' when NAACP membership records for alleged 'Communists' were demanded by a legislative investigating committee in Florida (U.S. 1963: p. 557).

The chilling effect may have originated in an even earlier undocumented example, but its precise origin is perhaps less relevant than the growing prevalence and import of the metaphor in the 20th and 21st centuries. Writing 15 years after the first judicial utterance of the chilling effect, Schauer found that the concept of the chilling effect had 'grown from an emotive argument into a major substantive component of first amendment adjudication' and that its use 'accounts for some very significant advances in free speech theory, and, in fact, the chilling effect doctrine underlies the resolution of many cases in which it is

neither expressed nor clearly implied' (1978: p. 685). The metaphor regularly appears in a variety of legal contexts, connected by the theme of freedom of expression, but quite different in nature from those early cases concerning freedom of political expression and association.

2.2. Defamation

The 'chilling effect' concept is perhaps best known in the context of defamation law and in particular, in the permanent form of defamation known as libel. This is partly because the chilling effect has been taken on as the war cry of individuals and organisations calling for the relaxation of onerous libel laws and reform of high libel costs, and was a motif of the high profile libel reform campaign of 2009-13³ that led to the introduction of the Defamation Act 2013 in England and Wales.⁴ The metaphor was also appropriated by the British government when it asserted that the new Act would 'reverse' the chill on freedom of expression (Ministry of Justice 2013); a claim which is difficult to assess, as will be further discussed below (see: 'Measurement').

For many media lawyers, it is *New York Times v Sullivan* (U.S. 1964) that most closely resonates with the chilling effect, which held that a state cannot award a public official damages for defamatory falsehood relating to his official conduct unless he or she proves 'actual malice', that is, that the defendant made a statement with knowledge that it was false or with reckless disregard of whether it was false or not. This landmark ruling has been widely perceived to reduce the chilling effect of defamation actions against US media organisations, but this came 'at a price', in Schauer's view (1978: p. 708). It was, he argues, an imperfect solution; it requires that 'we must prohibit the imposition of sanctions in instances where ideally they would be permitted' (1978: p. 685). Some commentators refer to this as another kind of chilling effect, where potential claimants may be deterred from pursuing a claim in defamation owing to legal uncertainty or relaxed provisions (see, for example, Kenyon, 2013: p.228; Page, 2015: p. 1).

It was several decades after the ruling in *New York Times v Sullivan* that the chilling effect concept really took hold in the English courts, although related issues had been considered. In *Derbyshire County Council v Times Newspapers* (UKHL 1992), which considered whether a local authority could maintain a claim for defamation damages, the House of Lords drew on *New York Times v Sullivan* to explain that while the decision was related to the US constitutional right to freedom of speech, 'the public interest considerations which underlaid them are no less valid in this country'. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important', observed Lord Keith (UKHL 1993: p. 8).

The 'chilling effect' was again directly discussed in *Reynolds v Times Newspapers Ltd* (UKHL 1999) although, as Cheer has pointed out (2008, p.66), the dicta 'reveal a House of Lords which is wary of the press and somewhat sceptical of a chilling effect'. Lord Nicholls acknowledged that unpredictability and uncertainty, coupled with the high costs of defending an action, affects a journalist's decision and may "chill" the publication of true statements of fact as well as those which are untrue'. The chill should not, however, be exaggerated and could vary between different types of publications. '[W]ith the enunciation of some guidelines by the court, any practical problems should be manageable' (UKHL 1999).

Ambiguity remained central to the chilling effect concept in Eady J's ruling in *Jameel v The Wall Street Journal Europe* (EWHC 2004), which found 'there is no more 'chilling effect' upon freedom of communication ... than uncertainty as to the lawfulness of one's actions' (para. 17). His point was underlined, perhaps, by the House of Lords' decision in the Wall Street Journal's favour, overturning the Court of Appeal's and Eady J's earlier decision that the publication did not have recourse to the qualified privilege defence established in *Reynolds* as the requirements of responsible journalism had not been satisfied; the Lords held that they had been (UKHL 2006); indeed, the lawfulness of one's actions is not easily predictable!

The subjectivities of the chilling effect were clearly demonstrated in the House of Lords ruling: Lord Bingham found 'the weight placed by the newspaper on the chilling effect' of the existing rule was in his opinion 'exaggerated' (UKHL 2006: para. 21). Baroness Hale, on the other hand, was more sympathetic to newspapers' position, describing a 'disproportionately chilling effect upon freedom of speech' (para. 154).

Though receiving mixed reception, the chilling effect is an increasingly common consideration in English defamation cases, since its first appearance in the late 20th century. While the doctrine may hold more sway in cases based in the US than in England and Wales, it has arguably affected influential judicial decisions in defamation cases, as well as broader policy; namely, the introduction of the Defamation Act 2013. It has also been a central consideration in a number of privacy cases.

2.2. Privacy

The courts' extension of the chilling effect concept to privacy law has been fairly seamless and widely adopted by the courts and the media. In *Mosley v News Group Newspapers Ltd* (EWHC 2008), in which the claimant Max Mosley successfully sued the News of the World newspaper for breach of privacy, exemplary damages were refused; in Eady J's view, such damages would have provided a form of relief in a new area of law that was unnecessary, nor legally prescribed. For that reason, 'the "chilling effect" would be obvious"' (para. 173).

Chilling effect claims have tended to focus on costs even when making a broader point about threats to freedom of expression. For example, when various freedom speech groups intervening in *Mosley v United Kingdom* (ECtHR 2011: para. 103) were concerned that any requirement to notify the subject of a story ahead of publication would give rise to a chilling effect, the focus was on the high cost of (even successfully) defending injunction proceedings arising from compulsory notification.

This case also highlighted several other facets of the 'chilling effect' principle. Beyond costs, the court considered the effectiveness of a pre-notification obligation and a possible exception for newspapers if they could show that the public interest was at stake. In this context, a narrowly defined understanding of public interest is identified as a potential chilling effect (para. 126). Additionally, the judgment reinforces another element of the chilling effect doctrine: that it anticipates the implications of future behaviour outside the case under consideration. Mosley's bid for a legally binding pre-notification requirement is examined beyond the facts of his case, considering the 'chilling effect to which a pre-notification requirement risks giving rise' (para. 132).

Whereas discussion of chilling effects in defamation have tended to concentrate on the damage to journalists' ability to hold political and financial power to account, it is not generally so in privacy, where many claims against the media have concerned the private lives of celebrities and sportspeople. In a speech in 2009, Sir David Eady observed that few privacy cases are contested with a public interest defence.

2.3. Freedom of Information

In the past few years, a chilling effect has been described in a very different context relating to communication: in relation to freedom of information (FOI) laws that enable public access to information. In this context, it would be a stretch to describe the chilling effect as a developed doctrine as such, but the concept has played an influential role in shaping discussions on the development of FOI.

It is not the public or press which has been described as chilled in this context but ministers and civil servants. It has been claimed that freedom of information laws can cause public servants to avoid frank and candid discussion during policy deliberations and to keep inadequate records (see Bannister 2015: p. 342). It remains a contentious claim that has been treated somewhat sceptically, however. Lord McNally told the UK's Independent Freedom of Information Commission that he had not witnessed ministers choosing to exchange views

privately rather than commit them to writing although he had heard ‘mandarins’ speak of this phenomenon (Gov.uk 2016: p. 36).

In the FOI context, the chilling effect argument has received markedly different treatment between tribunals and other bodies considering disclosure of the same information. A First-Tier Tribunal which considered a likely ‘discouragement of candour, imagination and innovation’ (FTT 2014: para. 60) resulting from disclosure of information on the implementation of universal work credit, found there was ‘no evidence to support the claim’ (2014: para. 62). In contrast, the Upper Tribunal subsequently found that expecting such evidence was an ‘unrealistic and unattainable standard for the Department [of Work and Pensions] to meet’ and that such effects might be ‘subtle’ and without paper trail. (UT 2015: para. 18).⁵

More generally, a parliamentary committee examining the issue was ‘not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act’ (House of Commons 2012: p. 75). The outgoing Information Commissioner Christopher Graham has suggested that ‘if mandarins keep talking about a chilling effect, theirs is a self-fulfilling prophecy’ (ICO 2015).

2.4. Surveillance

How does knowledge that you are being watched affect your behaviour? This is the question at the heart of the discussion on the chilling effect of surveillance powers – whether used by the state or a private entity such as Google or Facebook, for example. Survey research indicates that knowledge of monitoring programmes causes writers and journalists to self-censor what they search for (PEN American Center 2013), although the relationship between surveillance and individuals’ behaviour may be more nuanced than a ‘blanket silencing’ (see Stoycheff 2016).

The chilling effect is alluded to in surveillance-related case law, but not extensively or explicitly. In the *Digital Rights Ireland* case, Advocate General Cruz Villalón’s non-binding opinion identified a ‘vague feeling of surveillance’ which

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may affect rights to freedom of expression. But, he noted, the court did not have 'sufficient material' to give a ruling in that regard, and that the '[chilling] effect would be merely a collateral consequence of interference with the right to privacy (...)' (CJEU 2013: para. 52).

In this context, the claimed effect is perhaps even more pernicious than the defamation or privacy chills described above, as it affects not only what an individual might write but also what they might read.

2.5 Distinctions in use

Observed chilling effects are not limited to the communication areas described above; they have also been claimed in other areas of media law: as a result of the use of copyright, data protection, contempt of court and various criminal sanctions for speech.⁶ Within these various communication contexts the chilling effect takes different forms. To date, scholars have tended to define these in binary terms.

Benign and invidious chills

Schauer defines the 'benign' deterrence as 'an effect caused by the intentional regulation of speech or other activity properly subject to governmental control' (1978: p. 690). This is comparable to what a previous UK Information Commissioner saw as the 'beneficially chilling effect' of penalties to deter illegal data protection breaches (Graham, cited in Leveson 2012: para. 2.8, p. 1089). Cheer's study of defamation in New Zealand also emphasises the distinction that some chilling effects are permissible and desirable (2008: p. 62), suggesting that 'in order to protect reputation, defamation must chill some speech' (p. 63). These interpretations suggest that a chilling effect can be understood as benign and desirable, where a restriction is usefully and appropriately applied.

In contrast, Schauer describes what he sees as an undesirable chill: an 'invidious' deterrence: 'this can occur not only when activity shielded by the first amendment is implicated, but also when any behaviour safeguarded by the [US] Constitution is unduly discouraged' (1978: p. 690). The danger of 'invidious' deterrence, argues Schauer, lies in the fact 'deterred by the fear of punishment,

some individuals refrain from saying or publishing something that which they lawfully could, and indeed, should'. As well as the harm that arises from the non-exercise of a constitutional right, this could cause 'general societal loss' (p. 693).

Direct and indirect chills

Barendt et al. provide a two-part classification, which allows for both 'direct' and 'structural' illegitimate deterrence, or 'chilling effects'. The direct chill takes place when material is specifically changed as a result of legal considerations, of which the 'if in doubt, take it out' philosophy 'exemplified by most magazine editors and publishers' is part and described as 'conscious inhibition' or 'self-censorship' (Barendt et al. 1997: p. 191). Significantly, they identify that this is not necessarily 'uniform': 'different media experience [it] with notably different force'.

The second category, the 'structural' and indirect chilling effect refers to a 'deeper, subtler way in which libel inhibits media publication'. This prevents the very creation of media content, with avoidance of 'taboo' organizations and individuals: 'certain subjects are treated as off-limits, minefields into which it is too difficult to stray. Nothing is edited to lessen libel risk because nothing is written in the first place' (p. 192).

Additionally, there is a secondary form within this 'structural' deterrence, a tendency towards a more polemical and opaque style, favouring comment over 'clear' and 'hard-edged' investigative journalism, which the authors suggest could be a result of the journalists' interpretation of the fair comment defence, perceived as more lenient than the defence of justification in defamation cases⁷ (p. 193). They emphasise, however, that the idea that style has been moulded by the law of defamation is 'untestable', a commonly identified problem for researchers in this area.

The two sets of characteristics described by Schauer and Barendt et al. can manifest themselves as shown in the table below:

<INSERT TABLE 1>

At worst (for their freedom of speech), a publisher might encounter an invidious and direct chill; at best (for their freedom of speech), a benign and indirect chill. This scale is depicted below:

<INSERT FIGURE 1>

Chills arising from speech protection

Finally, there is evidence of alternative chills, which can be understood as side effects of attempts to reduce the chill on speech. In the context of defamation and privacy, some commentators have worried about the potential chilling effect on claimants and the inclination of individuals to enter public life. It has even been suggested that law enforcing authorities are themselves chilled. Leveson LJ, for example, suggested that a 'special enforcement regime' in the Data Protection Act 1998, giving the press special exemptions from legislative provisions, had a 'chilling effect on reasonable law enforcement and, equally, had a high risk of impacting unfairly on individuals' (Leveson 2012: para. 2.55, p. 1081).

3. Measurement

Though chilling effects are widely cited and claimed systematic and reliable evidence is difficult to locate within and outside case law. The overall methodological challenge is that one is seeking to prove a negative – or a counterfactual – and looking for evidence that could be seen to reflect badly on those 'chilled' or 'chilling' (see Knight 2015). In the context of FOI, it would require asking civil servants to admit they had been deliberately obfuscating information which could be seen as unprofessional conduct (Worthy, forthcoming). My own empirical research on the relationship between defamation and privacy law and journalism, suggests that while journalists and lawyers were often willing to discuss the chilling effect in general, they can be reluctant – or are unable – to give specific examples from their own experience (Townend 2015).

Kendrick suggests that problem with the application of the chilling effect concept is that 'both the detection of a problem and the imposition of a remedy involve intractable empirical difficulties' and unambiguously suggests that the US Supreme Court 'has founded the chilling effect on nothing more than unpersuasive empirical guesswork' (2013: p. 1633). Worthy points out two obstacles to documenting the chill in the FOI context: first, locating hard evidence rather than anecdote; and second, isolating FOI as the causal factor rather than departmental or ministerial leaks, or a tendency for informal meetings enabled by new technology. In his view, it is impossible to say if there is or is not an effect (Worthy, forthcoming).

Nonetheless, efforts have been made, particularly in the context of defamation and copyright. In the US, a Harvard-born project called the Chilling Effects Clearinghouse, now known as Lumen, has documented defamation and copyright threats in the form of cease-and-desist letters. One reason for changing its name in 2016 was that it could lead people to think that it only included 'notices that have in fact had a "chilling effect" on conduct or speech', which was too 'limiting' for its role as a 'neutral third party' collecting and monitoring notices (Lumen 2016). This points to a critical issue for any researcher documenting chills: to determine whether a threat could be described as a chill, one has to consider first whether a threat has deterred, or is likely to deter, speech; and second, whether such deterrence is necessarily undesirable. Given the variety of judicial interpretation on the desirability of speech, let alone everyday interpretation, this is not easy.

Kenyon argues that there are better ways than theoretical conjecture to assess the potential for defamation reform (2001: p. 546) and there have been a number of attempts to go beyond the case law and document the chill of defamation law in comparative studies using content analysis (Dent and Kenyon 2004) interviews and surveys (Kenyon and Marjoribanks 2008; Weaver et al. 2004; Cheer 2008; Townend 2014, 2015) but all indicate some of the methodological difficulties.

Kenyon's observation that the area deserves greater attention from researchers and their funders still stands over a decade later, certainly in the UK context. Researchers need not confine themselves to self-reporting surveys and interviews to gather data: observational techniques that record users' actual online behaviour could prove a fruitful if challenging methodology for monitoring deterring effects. Additionally, we might learn from the judicial consideration of the chilling effect in different communication and information law settings.

4. Seeking clarity

One of the few scholars to dig beneath the metaphor, Haig Bosmajian, warns that while tropes such as the chilling effect 'can help us comprehend what may have been incomprehensible', there is a danger that they can lead us to 'mislead, conceal, create misunderstandings, and come to rely on clichéd thinking' (1992: p. 205). Though the chilling effect and other communication metaphors have been used to develop doctrines and principles in law there is insufficient examination of their function and implication on judicial decisions (Bosmajian 1992: p. 7).

Academic empirical studies, public statements in speeches and the media and case law all indicate that chilling effect definitions in different communication contexts are indeed as 'slippery' and 'amorphous' as US Justice Harlan warned in the metaphor's younger days (U.S. 1967). This does not, however, mean that the phenomena described by the chilling effect metaphor are necessarily imagined or non-existent. Even those scholars engaged in critical analysis of the concept, are reluctant to suggest the chilling effect is not 'real' or should play no role in the development of law relating to freedom of expression.

The concept should not, however, be used without interrogation, especially when it is deployed as legal doctrine. This requires relevant parties, lawyers and judges to be specific about what they are describing. Are they talking about benign or invidious effects, i.e. where speech is deterred legitimately or illegitimately under current law? Are they referring to direct or indirect effects,

i.e. where speech is directly deterred as the result of a specific threat, or indirectly because there is a more general concern? Does speech risk being deterred because of a clear legal provision, or because of uncertainty in the law and the legal process? Is the issue the substantive law, or procedural factors such as cost? On what evidence have they drawn their conclusion, and why? This is especially important if the determination of a chilling effect forms part of the central reasoning in a case, or if a specific legal reform is being sought.

A clearer understanding of chilling effect claims would lead to a more appropriate application. Certainly, this would be helpful as a point of reference in lawmaking: for judges, parliamentarians and policymakers. But it would not reflect the way the metaphor is used in society and understood by individuals interacting with communication law, that is journalists, charity and NGO professionals and ordinary members of the public wishing to express themselves online and access information. A further problem is that boundaries between legitimate/desirable and illegitimate/undesirable speech are keenly contested, both within and outside courts. Even if one formed a definition based on, let's say, the public interest, it is clear that interpretations of the public interest can vary dramatically (see, for example, Morrison and Svennevig, 2002).

However the chilling effect is defined in relation to the exercise of human rights, some deterrence of expression is inevitable owing to the uncertainty of law and the fact that individuals are risk averse (see Schauer: p. 731), although lawmakers should seek to minimise this uncertainty in the clear design of foreseeable and accessible legislation and through comprehensible case law. Given that some sort of deterrence will always exist, the chilling effect doctrine applied by the courts allows judges to favour the protection of speech rights even in the absence of specific evidence predicting the future behaviour of individuals (see Schauer: p. 731-2).

5. Conclusion

In lieu of positing a firm definition for the social concept or legal doctrine, I propose that greater clarity in research, law and policymaking might be achieved through specificity about what is claimed when a chilling effect is asserted, and ideally, evidence of its existence (or its non-existence, if the opposite is claimed). This will help the formulation of better laws and legal processes relating to human rights and communication: reforming law where it is seen to have an overly and detrimentally restrictive effect on freedom of speech and simplifying court processes to reduce its burdens of mental stress, money and time.

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TABLE 1

Type of chill	Direct	Indirect
Benign	Where a specific threat of legal action deters illegitimate speech	Where a broad concern about legal action deters illegitimate speech

Invidious	Where a specific threat of legal action deters legitimate speech	Where a broad concern about legal action deters legitimate speech
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Table 1: Types of chills

FIGURE 1

Figure 1: Harm to freedom of expression caused by different types of ‘chilling effect’

<i>Less harmful</i>	<i>More harmful</i>
Benign/Indirect → Benign/Direct → Invidious/Indirect → Invidious/Direct	

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² This is the first instance of its use reported by Schauer (1978) and Bosmajian (1992). There may be earlier undiscovered judicial uses.

³ The campaign has not formally ended: although it considers the passage of the 2013 Act a marker of success in England and Wales and it is less active since that time, it continues to publicise the situation in Northern Ireland, where the Act has not been extended, and in Scotland, where it only partially applies.

⁴ See, for example, Glanville 2009; Glanville and Heawood 2009.

⁵ When the case was later re-heard in the First Tier Tribunal, the court was not convinced that risk of disclosure would create pressure to cause a change in civil servants’ behaviour (FTT 2016: para. 63).

⁶ In England and Wales this would include, for example, offences under Communications Act 2003 section 127 or the Malicious Communications Act 1988 section 1. There are also criminal offences associated with data protection, contempt of court and copyright. In other countries, defamation and breach of privacy may be treated as criminal offences.

⁷ The authors emphasise that it would be inaccurate for a journalist to act on the belief that presenting allegations of fact as statements of opinion will provide an automatic protection from libel action (Barendt et al. 1997: p. 193). These defences are now known as truth and honest opinion.

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